

Fathi (Migration) [2019] AATA 781 (21 February 2019)

DECISION RECORD

DIVISION: Migration & Refugee Division

REVIEW APPLICANT: Mrs Khadija Fathi

VISA APPLICANT: Mr Mohammad Hassan Panahi

CASE NUMBER: 1726099

DIBP REFERENCE(S): BCC2016/1773469

MEMBER: Russell Matheson

DATE: 21 February 2019

PLACE OF DECISION: Sydney

DECISION: The Tribunal remits the application for a Partner (Provisional) (Class UF) visa for reconsideration, with the direction that the visa applicant meets the following criteria for a Subclass 309 (Partner (Provisional)) visa:

- cl.309.211, cl.309.212 and cl.309.213 of Schedule 2 to the Regulations; and
- cl.309.221 of Schedule 2 to the Regulations.

Statement made on 21 February 2019 at 8:35am

CATCHWORDS

MIGRATION – Partner (Provisional) (Class UF) visa – Subclass 309 (Partner (Provisional)) – genuine spousal relationship – have a child together – social activities and travel – limited photographic evidence – persuasive oral evidence – did not visit each other for a period of over four years – financial constraints – decision under review remitted

1.

LEGISLATION

Migration Act 1958 (Cth), ss 5F, 65
Migration Regulations 1994 (Cth), r 1.15A; Schedule 2, cls 309.211, 309.212, 309.213, 309.221

Any references appearing in square brackets indicate that information has been omitted from this decision pursuant to section 378 of the Migration Act 1958 and replaced with generic information.

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

2. This is an application for review of a decision made by a delegate of the Minister for Immigration on 18 September 2017 to refuse to grant the visa applicant a Partner (Provisional) (Class UF) visa under s.65 of the *Migration Act 1958* (the Act).
3. The applicant (visa applicant) is a 25-year-old male national of Afghanistan. He applied for the visa on 1 April 2016 on the basis of his relationship with his sponsor, the review applicant. At that time, Class UF contained only one subclass: Subclass 309 (Partner (Provisional)). The criteria for the grant of this visa are set out in Part 309 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria. Relevantly to this matter, the primary criteria include cl.309.211.
4. The delegate refused to grant the visa on the basis that the applicant did not satisfy cl.309.211(2) because the delegate was not satisfied the applicant is the spouse of the sponsor. The sponsor seeks review of the delegate's decision.
5. The sponsor (review applicant) appeared before the Tribunal on 7 June 2018 to give evidence and present arguments. The Tribunal also received oral evidence from the applicant; the sponsors mother Aziza Jafari and sister Zahna Fathi.
6. The review applicant was represented in relation to the review by her registered migration agent.
7. For the following reasons, the Tribunal has concluded that the **matter should be remitted for reconsideration**.

8. **Background**

9. The applicant is a 25 year old male national of Afghanistan. He lives with his parents, two brothers and a sister in Dashti Barchi, Kabul. The sponsor arrived in Australia on 14 June 2012 on a [humanitarian] visa. She is a full-time student and resides with her mother, sister and two brothers at Mt Druitt.

CONSIDERATION OF CLAIMS AND EVIDENCE

10. The issue in the present case is whether the applicant is the spouse of the sponsor as defined in s.5F of the Act
11. The Tribunal has before it the Department of Immigration (the Department) file relating to the applicant; its own file; and a copy of the Department decision provided by the sponsor (review applicant) to the Tribunal.
12. The evidence the parties and witnesses provided at the Tribunal hearing is recorded throughout this decision record.
- 13.

Whether the parties are in a spouse or de facto relationship

14. Clause 309.211(2) and cl.309.221 require that at the time the visa application was made, and at the time of this decision, the visa applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. In the present case, the visa applicant claims to be the spouse of the review applicant who is an Australian permanent resident.
15. 'Spouse' is defined in s.5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act, there must be a mutual commitment to a shared life as a married couple to the exclusion of all others, the relationship must be genuine and continuing, and the couple must live together, or not live separately and apart on a permanent basis: s.5F(2)(a)-(d). In forming an opinion about these matters, regard must be had to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the visa applicant's and review applicant's household and their commitment to each other as set out in r.1.15A(3), which is extracted in the attachment to this decision.

Are the parties validly married?

16. If the parties are validly married, they may meet the requirements of a spousal relationship, but not a de facto relationship. The applicant provided a marriage booklet issued by the Consulate General of the Islamic Republic of Afghanistan in Peshawar, Pakistan indicating the parties were married on 9 June 2014. The applicant's and sponsor's marriage booklet serves as evidence that the parties are married to each other under a marriage which is recognised by the country in which the marital union took place. The Tribunal accepts that the marriage is permissible under the laws of Pakistan and none of the exclusions in s.88D(2) of the *Marriage Act 1961* apply. There is no evidence before the Tribunal to indicate that the marriage is not valid. On the evidence, the parties were married to each other under a marriage that is valid for the purposes of the Act as required by s.5F(2)(a).
17. After careful consideration of all of the evidence before it, the Tribunal has reached the conclusion that it is satisfied the applicant is the spouse of the sponsor within the meaning of s.5F of the Act. Below the Tribunal sets out its consideration of the evidence under the relevant aspects of matters it must take into consideration under r.1.15A(3), and the reasons for its decision.
18. The Tribunal had the benefit of the applicant's and the sponsor's oral evidence and two witnesses. The Tribunal gave all the evidence provided by the parties at the Tribunal hearing and the information contained in the Departmental and Tribunal files due regard. The Tribunal considered evidence given by the sponsor, the applicant and witnesses to be detailed, consistent and credible.
19. The Tribunal acknowledges the delegate's concerns set out in the primary decision record. The Tribunal discussed these with the applicant and the sponsor in the course of the hearing and the Tribunal is satisfied that the explanations offered are plausible.

Are the other requirements for a spousal relationship met?

20. Financial Aspects

21. The Tribunal has considered the financial aspects of the relationship including any joint ownership of real estate or major assets, any joint liabilities, the extent of any pooling or sharing of financial resources, whether any person in the relationship owes any legal

obligation in respect of the other, and the basis of any sharing of daily household expenses and any combined future financial commitments or plans.

22. The applicant and sponsor gave evidence that they are both unemployed and the sponsor is pregnant and receiving Centrelink payments. The applicant provided evidence that he resides in Afghanistan and there is very limited opportunity for employment and he had little opportunity to financially support the sponsor during her pregnancy. The parties stated that they shared the expense of the visa application. The sponsor provided documentary evidence of money transfers to the applicant and her father-in-law and stated that she was aware of the economic struggle the applicant and his family were facing in Afghanistan. The sponsor sent money transfers totalling \$1,545 in January 2017 and April 2018. The applicant stated that the money was used for the cost of living and daily expenses. The sponsor stated that she travelled to Afghanistan and Iran to be with the applicant and his family in January and February 2018. The parties gave evidence that during the sponsor's visit overseas that the applicant paid for the day-to-day living expenses. The parties provided a number of untranslated receipts in regards to various expenses during the trip. The Tribunal places little weight on the receipts as to sharing or pooling financial resources.
23. The applicant and sponsor provided limited evidence regarding the financial aspects of their relationship, including evidence of any pooling of financial resources, sharing of day-to-day expenses or shared financial commitments for their life together as spouses.
24. The parties have no joint liabilities or major assets together. There is little evidence before the Tribunal to indicate that the parties share or pool their financial resources. There is no evidence before the Tribunal that one person in the relationship owes any legal obligation in respect of the other. There is little evidence before the Tribunal to support that the parties share the day-to-day living expenses or pool their financial resources.
25. The Tribunal accepts there is a degree of difficulty in establishing and sharing financial resources when the sponsor and applicant live in separate countries. The Tribunal finds based on the evidence before it, that the sponsor has provided some financial support towards the applicant. The Tribunal affords moderate weight on this aspect of the relationship.

26. *Nature of the household*

27. The Tribunal has considered the nature of the household including any joint responsibility for the care and support of children if any, living arrangements of the parties and the sharing of the responsibility for housework.
28. The applicant and sponsor submitted evidence that they remained in Pakistan for approximately one month after they registered their relationship in June 2014 as husband and wife before the sponsor returned to Australia. In January 2018, the sponsor and her mother and brother travelled to Afghanistan and Iran and provided photographic evidence of the trip with friends and family members. The parties gave evidence that they lived together as husband and wife at the applicant's home and the parties' child was conceived during this time. The sponsor was pregnant at the time of the review hearing and has since given birth. The sponsor provided a copy of the child's birth certificate indicating the child was born on 6 October 2018 and the applicant and sponsor named as the biological parents. The Tribunal queried if invited would the parties be prepared to submit to a DNA test in relation to the birth of the child and they answered 'yes'. The Tribunal accepts there is a child of the relationship.
29. The Tribunal accepts there are difficulties associated with establishing a joint household and living together for significant periods of time when the parties live in separate countries. The

Tribunal accepts the applicant is prepared to help the sponsor with the raising of their child. The Tribunal places considerable weight on this aspect of the relationship

30. Social aspects

31. The Tribunal considered the social aspects of the relationship, including whether the parties represent themselves to other people as being married to each other, the opinion of friends and acquaintances about the nature of the relationship, and any basis on which the parties plan and undertake social activities.
32. The applicant has submitted limited evidence to demonstrate that their relationship is socially accepted including a statutory declaration from the sponsor's mother and sister attesting to their relationship and a number of photographs of their wedding celebrations in the presence of family and friends to the Department. The parties stated that on the sponsor's recent trip to Afghanistan and Iran they travelled together sightseeing, dined out with family and friends and went on a pilgrimage. The parties provided additional photographic evidence of their wedding, gifts purchased by the applicant for the sponsor, and recent travel to Afghanistan and Iran in the company of each other and family and friends.
33. The parties provided photographic evidence of their social activities and travel together in Iran with the applicant's family. Although the parties provided limited photographic evidence of their social activities, the Tribunal found the parties' oral evidence persuasive as to the genuineness of their relationship. The parties provided limited statements from third parties that give little insight as to the nature of the relationship or convincing reasons as to why they believe the relationship is genuine. The Tribunal places little weight on the statements. The sponsor and her agent provided written submissions in regard to the genuineness of the parties' relationship which are detailed and convincing as to the nature of the relationship and the Tribunal places considerable weight on the submissions.
34. Overall, the Tribunal accepts the applicant and the sponsor plan and undertake social activities and travel together. The Tribunal is satisfied that the parties represent themselves to family, friends and other people as being in a marital relationship. The Tribunal is satisfied that family, friends and relatives view the relationship as a genuine and committed one.

35. Commitment

36. The Tribunal has considered the nature of the parties' commitment to each other including the duration of the relationship, the length and time the parties have lived together, the degree of companionship and emotional support they provide each other, and whether the parties view the relationship as a long-term one.
37. The applicant and sponsor claim to have known each other from a very young age living in the same neighbourhood in Tehran, Iran [and] both their families were close. The sponsor claims to have been the applicant's girlfriend unbeknown to her parents before her family relocated [to] Australia in June 2012. The parties claim to have exchanged details and remained in contact with each other. The parties claim that their respective families are close and the sponsor's grandmother lives with the applicant's family in Afghanistan. The parties claim they obtained the blessing of both their families and made arrangements to marry when the sponsor visited her ill grandmother. The applicant and sponsor were married by proxy and the applicant provided as evidence a copy of the marriage booklet which serves as evidence that the parties are married to each other under a marriage that is recognised by the country in which the marriage took place. The Tribunal accepts that the parties are legally married. The parties have been married for more than four and a half years.

38. The parties gave evidence that they intend to live together as a family with the sponsor's sister and her family in Australia before finding their own place to live. The parties gave evidence that they intend to live together independently as a family unit in Australia. The parties stated that they are in a genuine relationship and are in a committed relationship according to their tradition and culture. The Tribunal found the applicant and sponsor's evidence genuine and convincing in regard to living together in the future.
39. The applicant gave evidence that he wanted to come to Australia to study and be gainfully employed so that he could provide comfort, care and financial support to his wife and child.
40. The applicant and sponsor provided evidence that they applied for the Partner visa two years after marriage and did not visit each other for a period of over four years because of the financial circumstances and constraints they were under due to having no savings and both being unemployed. The sponsor also provided evidence that they did not engage a migration agent initially and had limited knowledge of what evidence they should provide with the visa application and therefore there is limited documentary evidence of communication during separation in the early stages of their marriage other than pre-paid phone cards. The parties provided more recent documentary evidence of call logs and chat screenshots at the review hearing. The Tribunal found the parties genuine and their explanation plausible in regard to their communication during times of separation.
41. The parties presented documentary evidence of continued daily contact during periods of separation and a sound knowledge of each other's lives, family, living arrangements, health issues, personal history and future together with their child.
42. The Tribunal is satisfied that the parties see their relationship as stable, mutually supportive and a long-term one. The Tribunal considers their evidence with regard to their commitment to each other plausible, persuasive and genuine.
43. The Tribunal is satisfied the applicant and the sponsor provide each other a degree of companionship and emotional support that is commensurate with a couple being in a genuine and continuing relationship. The Tribunal is satisfied the couple view their relationship as a long-term one.
44. The Tribunal is satisfied, having regard to the totality of the circumstances and the evidence provided that the applicant and the sponsor have a mutual commitment to a shared life to the exclusion of all others. The Tribunal is satisfied their relationship is a genuine and continuing relationship and that they do not live separately and apart on a permanent basis.

45. Findings

46. On the basis of the above, the Tribunal is satisfied that the requirements of s.5F(2) are met at the time the visa application was made and at the time of this decision.
47. Given these findings, the Tribunal is satisfied that at the time the visa application was made and at the time of this decision the parties were in a spousal relationship. Therefore the visa applicant meets cl.309.211(2) and cl.309.221.
48. There is no evidence before the Tribunal that the spouse of the applicant is prohibited from being the sponsor of the applicant. The Tribunal is satisfied that the sponsor at the time of the visa application was an Australian permanent resident who had turned 18. Therefore the applicant meets cl.309.212 and cl.309.213.
49. Given the findings above, the appropriate course is to remit the application for the visa to the Minister to consider the remaining criteria for a Subclass 309 visa.

DECISION

50. The Tribunal remits the application for a Partner (Provisional) (Class UF) visa for reconsideration, with the direction that the visa applicant meets the following criteria for a Subclass 309 (Partner (Provisional)) visa:
- cl.309.211, cl.309.212 and cl.309.213 of Schedule 2 to the Regulations; and
 - cl.309.221 of Schedule 2 to the Regulations.

Russell Matheson
Member

51.

ATTACHMENT - Extract from Migration Regulations 1994

1.15A Spouse

- (1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.
- (2) If the Minister is considering an application for:
 - (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).
- (3) The matters for subregulation (2) are:
 - (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day-to-day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being married to each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long-term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).